

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Qwest Communications International, Inc.)	WC Docket No. 02-89
)	
Petition for Declaratory Ruling on the)	
Scope of the Duty to File and Obtain)	
Prior Approval of Negotiated Contractual)	
Arrangements Under Section 252(a)(1))	
)	

**REPLY COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

The Association of Communications Enterprises (“ASCENT”),¹ through undersigned counsel and pursuant to *Public Notice*, released in the above-captioned proceeding on April 29, 2002, and Order, DA 0201363, released June 11, 2002, hereby responds to the comments filed in this proceeding. In addition to submissions made on behalf of the Iowa Utilities Board, the Minnesota Department of Commerce and the Attorney General of the State of New Mexico and the Iowa Office of Consumer Advocate, comments were submitted in this proceeding by AT&T Corp., WorldCom, Inc., Sprint Corporation, New Edge Network, Inc., Mpower Corporation, Focal Communications Corporation and Pac-West Telecomm, Inc., and Touch America, Inc. Without exception, every commenter vigorously opposed Qwest’s Petition, through which the incumbent local exchange carrier (“LEC”) sought Commission sanction of its internal policy of filing less than

¹ ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services.

all of its negotiated interconnection agreements with state commissions as required by Section 252(a)(1) of the Telecommunications Act of 1996. ASCENT notes that it is extremely rare for a Declaratory Petition to generate such universal opposition. In this circumstance, however, where Qwest seeks a declaratory ruling from the Commission which is directly contrary to the language and purpose of Section 252 in order to extricate itself from difficulties in which it has become embroiled before various state commissions, such universal opposition is indeed justified.

As an initial matter, the comments demonstrate that the “ambiguity” which Qwest strains to create in Section 252 simply does not exist. ASCENT wholeheartedly agrees with AT&T that

Congress unequivocally directed Qwest and other incumbent local exchange carriers (“LECs”) to file ‘[a]ny’ interconnection agreement adopted by negotiation, 47 U.S.C. §§ 252(a), (e). The plain language and purpose of this section obligations Qwest and other incumbents to submit *interconnection agreements* – not merely some, or selected passages of, such agreements.²

Qwest argues . . . that ‘agreement’ means something less than entire agreements, but there is, in fact, no such ‘uncertainty’ about the scope of the section 252 filing requirement. By its plain terms, the statute requires the filing of ‘the agreement,’ not just ‘aspects’ of agreements that incumbent LECs deem important, and certainly not, as Qwest suggests, just an itemized schedule of the charges that apply under the agreement.³

WorldCom and Sprint echo AT&T’s assertion, stating, respectively, that “Section 252(a)(1) requires that negotiated interconnection agreements be submitted to the appropriate state commission. There

² Opposition of AT&T Corp., pp. 1-2.

³ Id., pp. 3-4.

are no exceptions or limitations to this requirement,”⁴ and that “[b]y its plain language, the ‘detailed schedule of charges’ referred to in Section 252(a)(1) constitutes the minimum – not as Qwest apparently believes, the maximum – categories of information that must be provided.”⁵

The state commenters as well denounce Qwest’s attempts to create an ambiguity in Section 252. The Minnesota Department of Commerce states, in its Opposition, that “[t]here is no need for the FCC to issue the ruling sought by Qwest in its Petition. . . the Act and the Commission’s decisions interpreting it are clear: all interconnection agreements must be filed for approval by the relevant state commission under 47 U.S.C. § 252(a)(1) and 47 U.S.C. § 252e.”⁶ The Attorney General of the State of New Mexico and the Iowa Office of Consumer Advocate also remind the Commission, “Section 252(h) requires all agreements to be filed. 47 U.S.C. § 252(h). Filing goes to the heart of the Act’s regulatory scheme, and is not simply a ministerial task.”⁷

And the Iowa Utilities Board turns the Commission’s attention to the fact that Section 252 does not exist in isolation; similar filing obligations confront Qwest at the state level as well:

⁴ Comments of WorldCom, Inc., p. 2 (also noting that “In the Local Competition Order [¶ 165] the Commission confirmed that section 252(a) required all interconnection agreements to be submitted to the state commission for approval pursuant to section 252(e). Id., p. 4.)

⁵ Comments of Sprint Corporation, p. 2. *See also* Comments of Focal Communications Corporation and Pac-West Telecomm, Inc., p. 6 (“In implementing the local competition provisions of the Act, the Commission concluded that the Act ‘does not exempt certain categories of agreements’ from the state filing requirement.”)

⁶ Comments of the Minnesota Department of Commerce in Opposition to Qwest’s Petition for Declaratory Ruling, p. 1.

⁷ Comments of the Attorney General of the State of New Mexico and the Iowa Office of Consumer Advocate, p. 6.

The [Iowa] Board has adopted rules that require the filing of ‘all interconnection agreements’ adopted by arbitration or negotiation. 199 IAC 38.7(4). The requirement applies to both parties to the agreement; neither the statute nor the rule releases either party from the filing obligation.⁸

Thus,

any binding arrangement or understanding between an ILEC and a competitive local exchange carrier (CLEC) about any aspect of the interconnection between the two carriers, or the provision of services or network elements which in turn are used to provide a telecommunications service, should qualify as an interconnection agreement under § 252(a)(1) and should be filed with the Board for approval.⁹

⁸ Comments of the Iowa Utilities Board, pp. 4-5.

⁹ Id., p. 7.

The comments also convincingly counter Qwest's attempts to portray state commission consideration of interconnection agreements as inappropriately intrusive. As the Attorney General of New Mexico notes, "state regulatory commissions have a role to prevent discrimination to the detriment of third-party competitors, the public interest and consumers. This can only be accomplished if all negotiated agreements are filed and reviewed."¹⁰ In furtherance of these goals, "Section 252(e) . . . requires that any interconnection agreement adopted by negotiation or arbitration be submitted for approval to the State Commission with approval or rejection during a 90-day time frame."¹¹ Indeed, only "state regulatory commission review of agreements will prevent discrimination against CLECs that are not a party to the agreement and, by doing so, protect the public interest. State regulatory commissions *must* review the agreements in conformity with the federal Telecommunications Act of 1996."¹²

The very real reasons such state commission review is essential are also forcefully presented by the Commenters. As WorldCom observes, "absent regulatory scrutiny, Qwest can exercise its monopoly power to extract onerous concessions from individual CLECs that are contrary to the public interest."¹³ The Attorney General of the State of New Mexico and the Iowa Office of

¹⁰ Comments of the Attorney General of the State of New Mexico and the Iowa Office of Consumer Advocate, p. 10. See also, Comments of the Iowa Utilities Board, p. 10 ("State approval of each interconnection agreement is required to ensure that an agreement does not discriminate against other carriers that are not parties to the agreement, that implementation of the agreement is in the public interest, and that it conforms to the duties imposed on local exchange carriers by § 251 and the pricing standards imposed by § 252(d).")

¹¹ Comments of Focal Communications Corporation and Pac-West Telecomm, Inc., p. 2.

¹² Comments of the Attorney General of the State of New Mexico and the Iowa Office of Consumer Advocate, p. 2 (emphasis added).

¹³ Comments of WorldCom, Inc., p. 6.

Consumer Advocate echo that concern, stating that “by entering into interconnection agreements, but not publicly disclosing them by filing them with state commissions for review, ILECs can further their monopoly power at the expense of the consumer and contrary to the express purposes of the Act.”¹⁴ New Edge Network is correct that “[t]he issue of what is required to be filed is of great importance . . . because once an agreement, or portion thereof, is approved by a state commission it is subject to the opt-in provisions contained in section 252(i) of the 96 Act.”¹⁵ As a result, “the effects of [Qwest’s] suggestions, if adopted, would be extremely far-reaching. Its proposal is designed to

¹⁴ Comments of the Attorney General of the State of New Mexico and the Iowa Office of Consumer Advocate, p. 3. (Thus, “[l]imiting ‘filing and approval’ to only those agreements that contain a ‘detailed schedule of itemized charges for interconnection and each service or network element included in the agreement’ would be little, if any, protection against favorable contract terms offered by Qwest to one CLEC to the detriment of other CLECs.” *Id.*, p. 8.)

¹⁵ Comments of New Edge Network, Inc., p. 2.

give Qwest greater control and leverage in the ‘negotiation’ process between ILECs and CLECs, and to limit the ability of CLECs to ‘opt in’ to agreements.”¹⁶

Finally, ASCENT notes that the commenters deftly cut through Qwest’s purported rationale for bringing its petition to the Commission. Rather than seeking the removal of an ambiguity in Section 252’s interconnection agreement filing requirement, “a more plausible and honest explanation for Qwest’s Petition,” opines New Edge Network, “is that the Company is trying to preempt state commissions from investigating whether or not Qwest has violated section 252(a)(1) of the 96 Act.”¹⁷ WorldCom characterizes Qwest’s Petition as “nothing more than an after-the-fact attempt to obtain regulatory relief from the Federal Communications Commission (the “Commission”) for Qwest’s failure to obtain prior state commission approval of interconnection agreements negotiated under section 252(a)(1) of the Telecommunications Act of 1996.”¹⁸

¹⁶ Comments of Focal Communications Corporation and Pac-West Telecomm, Inc., p. i.

¹⁷ Comments of New Edge Network, Inc., p. 3.

¹⁸ Comments of WorldCom, Inc., p. 1.

The state commenters agree. The Minnesota Department of Commerce believes “Qwest’s Petition seeks to modify and narrow these clear and unambiguous standards to achieve Qwest’s self-serving goals of avoiding regulatory scrutiny. The underlying motivation behind Qwest’s bringing this Petition lies not in Qwest’s need for guidance, but rather in its attempt to forestall further investigation into its practice of entering into secret agreements with CLECs in order to further Qwest’s regulatory agenda.”¹⁹ As to a possible preemption of state commission investigations, both the Minnesota Department of Commerce and the Iowa Utilities Board remind the Commission that Qwest is already under investigation in several states for apparent violations of Section 252. In Minnesota, “the Department has been conducting an investigation into Qwest’s practice of entering into unfiled agreements with CLECs that define terms and conditions of interconnection and access to unbundled network elements (“UNEs”). Eleven such agreements (the “Secret Agreements”) form the basis of a complaint filed on February 14, 2002, by the Department against Qwest before the Minnesota Public Utilities Commission.”²⁰

Discussing the ongoing investigations, the Iowa Utilities Board notes

Some of the rates are specific to Minnesota, but other provisions purport to apply in all 14 Qwest states, including Iowa. . . . As a result of [McLeod Agreement No. 1] Qwest discriminated against other CLECs in favor of McLeod, at least in Minnesota. Other CLECs that purchased services for resale apparently began paying higher rates on February 8, 2000, but McLeod was permitted to continue to purchase those same services at the lower interim rates for several more weeks. It was a form of discrimination to extend this favored treatment to McLeod and not to other CLECs.

¹⁹ Comments of the Minnesota Department of Commerce in Opposition to Qwest’s Petition for Declaratory Ruling, p. 1. *See also* Comments of AT&T Corp., p. 2 (“Qwest’s filing occurs as state regulators and would-be competitive LECs have finally begun to unravel what appears to be a deliberate, region-wide scheme by Qwest to violate its nondiscrimination obligations by doing precisely what Section 252(a)(1) forbids: conspiring to confer secret, favorable interconnection ‘deals’ on selected competitive LECs in exchange for their ‘acquiescence’ in Qwest’s broader regulatory agenda.”)

²⁰ Id.

This discrimination would not have been possible if the agreement had been filed with the various state commissions where it was intended to have effect (all 14 Qwest states).²¹

Addressing the interconnection agreements applicable in Iowa, the Iowa Utilities Board states that “those agreement include interconnection agreement provisions that should have

²¹ Comments of the Iowa Utility Board, p. 13.

been filed with the Board pursuant to § 252. Because these provisions speak for themselves . . . the Board . . . can conclude that Qwest has violated its obligations under § 252 and 199 IAC 38.7(4).”²²

ASCENT agrees with Focal Communications and Pac-West Telecomm that “Qwests effort to carve out a new ‘interpretation’” as seeking nothing short of a “reversal of the policy decisions already made by this Commission.”²³ For this reason alone, the Commission cannot grant Qwest’s petition. As AT&T observes, “this is not a close question. Qwest’s proposed construction of § 252(a) is quite plainly impermissible, and no Commission order purporting to endorse that construction could hope to survive judicial review.”²⁴ Totally separate and apart from the harm the Commission would do to the integrity of the Telecommunications Act, however, it is clear that “if the Commission were to endorse Qwest’s Petition, it would practically absolve Qwest of any wrong doing regarding the Company’s concerted effort not to file numerous voluntary agreements,”²⁵ effectively eviscerating the ability of state commissions to investigate potential violations of state rules and regulations and sanctioning incumbent LEC violations of Section 252’s filing requirement. Clearly, this is a result which must be avoided.

²² Id., p. 9.

²³ Id., p. 7.

²⁴ Opposition of AT&T Corp., p. 10.

²⁵ Comments of New Edge Network, Inc., p. 4.

For the reasons set forth above, the Commission must deny Qwest's Petition for Declaratory Ruling.

Respectfully submitted,

**ASSOCIATION OF COMMUNICATIONS
ENTERPRISES**

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